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EX PARTE – VIA ELECTRONIC MAIL

The Honorable Kathleen Q.Abernathy
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: *Unbundled Access to Network Elements,* WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338

Dear Commissioner Abernathy:

The recent proposals to limit competitor's access to all UNE loops-including DS0 loops-will kill existing competition, and inhibit the development of competitive markets where competitors have not yet gained a significant market share. Qwest submitted a proposal on December 3, 2004 for unbundling relief based on a self-executing market share test. While the particular circumstances of Qwest's markets may call for relief under the law, I am very concerned about the collateral impact on other markets of eliminating a competitors' access to DS0 loops in the Triennial order. For both policy and legal reasons, I urge the Commission to consider Qwest's situation in the existing dockets and evaluate ideas and standards for limiting access to loops in particular markets based on a full record after public notice. I agree that the Commission should set standards for when a market can be considered competitive, however I agree with the Commission's previous suggestion that a retail market share test is not appropriate under current law because it doesn't relate to the "impairment" standard and does not allow consideration of factors specific to the relevant market. A truly competitive market is one where the incumbent is willing to sell UNEs at a price that competitors are willing to pay.

The Act requires that incumbents provide unbundled access to loops (251(c)(3)), and it also provides that the Commission can adopt rules to classify other carriers as incumbents (251(h)(2)). Separately, incumbents may seek forbearance from unbundling requirements at any time-just as Qwest did for Omaha-when , in their judgment, the requirements have been met. For the Commission through an order based on no record acts on an unnoticed issue to accomplish what the Act provides an alternative process is reversible error. The ball will not have been moved forward on this issue by handling it in a manner that provides such a clear path for appeal. It is in the interests of the Commission and the industry to have the order stay out of the courts this round.

Cutting off access to loops would impair competitive providers' access to capital thus destroying competitive markets. The Act gave market entrants alternatives for serving customers with the goal of transitioning to full facilities-based competition in recognition of the realities of the market place. A competitor needs to establish relationships with customers before it can raise capital to invest in its own facilities. Because of the superior price and service options that are available over its own facilities, competitors have every incentive to move off the incumbents' network. Eliminating a competitors' ability to develop new customer relationships (or maintain existing ones) will cut off the development of competitive telecommunications markets.

Qwest's proposal for a self-effectuating mechanism is fraught with the potential for abuse. Qwest's analysis is based on the competitive markets' impact on the incumbent. The Act requires the policy makers to focus on the interests of consumers, rather than incumbent providers. Protecting them from the impact of competitive markets is not required by the Act. In order to give effect to any retail market share test (which standing alone, I do not believe is a sufficient measure of impairment or full implementation of 251(c)), the relevant market needs to be defined, but leaving it to the incumbent's definition is having the fox guard the hen house. And even if Qwest had provided any clarity as to what it meant for consumers to be "reached" by a competitive suppliers, the incumbent cannot reasonably be expected to have accurate information about what percentage of the market can be so "reached."

All this points to the fact that the Commission must consider these issues based on a full record, not based on percentages that have no factual or economic underpinnings, on an ILEC-definable market definition, and with absolutely no discussion of what constitutes "facilities of competitive suppliers" under this self-effectuating scheme. These are important policy issues that could have great impact on service to consumers, requiring the attention of the Commission and the industry based on a full record. If given the opportunity, GCI will offer more detailed comments on how competitive markets should be defined consistent with current law and its experience as a competitive provider.

Sincerely,

/s/

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cc: (via electronic mail)
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